

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JAN 10 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:

KATHERINE RIEMAN,

Petitioner/Appellee,

and

JOSEPH RIEMAN,

Respondent/Appellant.

2 CA-CV 2011-0042
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20102044

Honorable Sharon Douglas, Judge Pro Tempore

AFFIRMED

West & Zickerman, PLLC
By Anne Elsberry

Tucson
Attorneys for Petitioner/Appellee

Kimminau Law Firm, PC
By Chris J. Kimminau

Tucson
Attorney for Respondent/Appellant

E C K E R S T R O M, Presiding Judge.

¶1 In this marital dissolution action, the trial court entered default judgment against appellant Joseph Rieman. On appeal, he maintains the court erred by denying his motion to vacate the decree. We affirm for the reasons set forth below.

Factual and Procedural Background

¶2 Appellee Katherine Rieman filed a petition for dissolution in May 2010 seeking spousal maintenance and an equitable division of community property and debts. Joseph was served with the petition but neither responded to it nor appeared to contest the action. As he later explained, he had “wanted to save . . . money by not hiring a lawyer” and believed that “by not filing a Response, the marriage would legally end and he would receive a proposal of property division.” With Joseph thus having taken no action with respect to the petition, Katherine applied for and obtained an entry of default. On September 24, 2010, the trial court conducted a hearing and entered a decree of dissolution by default.

¶3 On October 15, 2010, Joseph, now represented by counsel, filed a verified “motion to vacate [the] decree of dissolution.” The motion alleged, *inter alia*, that the decree’s property distribution was inequitable because liabilities on the real property and a business Joseph had received gave him a “net debt of \$30,000.00,” whereas Katherine “was awarded . . . land worth approximately \$200,000.00 owned free and clear.” He further claimed that Katherine had told him she was not seeking spousal maintenance. Joseph sought an evidentiary hearing in his motion but did not include any legal citations indicating the basis for the motion or the requested hearing. He did not file a reply to Katherine’s response to his motion.

¶4 Following a hearing at which no evidence was taken, the trial court denied the motion, finding it had been brought pursuant to Rule 85(C)(1)(f), Ariz. R. Fam. Law P. In its minute entry ruling, the court noted that Joseph “admits . . . his neglect in filing a response is not excusable.” The court further found that the facts Joseph had alleged did not “demonstrat[e] an extreme case of hardship or injustice” so as to warrant relief under the rule. The court filed its signed order denying the motion on January 11, 2011, and this appeal followed.

Discussion

¶5 “Generally, a default judgment is not appealable. Rather, only an order setting aside or refusing to set aside the judgment is appealable.” *Kline v. Kline*, 221 Ariz. 564, ¶ 11, 212 P.3d 902, 906 (App. 2009). Under Rule 44(C), Ariz. R. Fam. Law P., a trial court may set aside a default judgment in a dissolution proceeding for the reasons set forth in Rule 85(C), Ariz. R. Fam. Law P. The latter rule was patterned after Rule 60(c), Ariz. R. Civ. P. *See* Ariz. R. Fam. Law P. 85 cmt. Accordingly, like a ruling on a motion to set aside judgment under Rule 60(c), we review the trial court’s ruling here for an abuse of discretion. *See Birt v. Birt*, 208 Ariz. 546, ¶ 9, 96 P.3d 544, 547 (App. 2004).

Misrepresentation or Fraud

¶6 Joseph first argues the trial court “failed to recognize that [he had] asserted grounds for relief under Rule 85(C)(1)(c),” Ariz. R. Fam. Law P., relating to alleged “misrepresentation or fraud” by Katherine, and he asks that we reverse the court’s ruling “to permit . . . an opportunity to prove his allegations at an evidentiary hearing.” In his

motion below, Joseph claimed that when he had expressed his “concern” about Katherine “asking for spousal maintenance,” she had “stated she was not.” Joseph did not indicate when this conversation had occurred, however, and his motion otherwise did not allege any act of fraud, misrepresentation, or misconduct. As noted above, the trial court found Joseph’s post-decree motion had been made only under Rule 85(C)(1)(f), and the court denied it on this basis.

¶7 Under Rule 35(A)(1), Ariz. R. Fam. Law P., a post-trial motion must specify the grounds for the motion “with particularity” and must include “a memorandum indicating, at a minimum, the precise legal points, statutes and authorities relied upon.” Joseph’s motion here, which lacked any legal citations whatsoever, failed to comply with the minimum requirements of Rule 35. In addition, the motion did not use any of the words “fraud, misrepresentation, or . . . misconduct” found in Rule 85(C)(1)(c). Furthermore, Katherine’s petition for dissolution stated that she was seeking an award of spousal maintenance, and Joseph acknowledges this fact in his opening brief. *Cf. Villalba v. Villalba*, 131 Ariz. 556, 557, 642 P.2d 901, 902 (App. 1982) (upholding default judgment against properly served husband notwithstanding husband’s affidavit regarding informal settlement agreement and his “belie[f] no further court proceedings were pending”). Finally, because Joseph has not included in the record on appeal a transcript from the hearing on his motion, we presume such a transcript would support the trial court’s findings and rulings. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶8 For all these reasons, we accept the trial court’s determination that the motion was made exclusively pursuant to Rule 85(C)(1)(f). We find no abuse of discretion in the court’s implicit determination that Joseph had made no specific allegations of fraud or misrepresentations in his motion that would warrant setting aside the judgment or holding an evidentiary hearing.

Injustice

¶9 Joseph further maintains the trial court abused its discretion by denying his motion because the dissolution decree’s division of property and debts was inequitable. We disagree.

¶10 Under Rule 85(C)(1)(f), Ariz. R. Fam. Law P., a trial court may grant a defaulted party’s motion for “any other reason justifying relief from operation of the judgment.” Like the analogous provision in Rule 60(c)(6), Ariz. R. Civ. P., this portion of Rule 85(C) is “a residual clause which reserves to the court power to do justice in a particular case when relief is not available under other parts” of the rule. *East v. Hedges*, 125 Ariz. 188, 189, 608 P.2d 327, 328 (App. 1980). The residual clause thus applies only “when our systemic commitment to finality of judgments is outweighed by extraordinary circumstances of hardship or injustice.” *Birt v. Birt*, 208 Ariz. 546, ¶ 22, 96 P.3d 544, 549 (App. 2004), *quoting Panzino v. City of Phx.*, 196 Ariz. 442, ¶ 6, 999 P.2d 198, 201 (2000).

¶11 In support of his argument, Joseph cites cases stating that default judgments generally are disfavored, *Sloan v. Florida-Vanderbilt Dev. Corp.*, 22 Ariz. App. 572, 574, 529 P.2d 726, 728 (1974), and that an appellate court may at times “look over the

shoulder’ of the trial court and . . . substitute its judgment for that of the trial court” with respect to a motion to set aside judgment. *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 164, 871 P.2d 698, 711 (App. 1993). But he overlooks that this de novo type of review occurs where the ““facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations,”” *Birt*, 208 Ariz. 546, ¶ 9, 96 P.3d at 547, *quoting State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983), which is not the case here. Instead, we are presented with a situation where the trial court has a ““more immediate grasp”” of the facts relevant to the motion, and its ruling thus is entitled to deference by a reviewing court. *Id.*, *quoting City of Phx. v. Geyler*, 144 Ariz. 323, 329, 697 P.2d 1073, 1079 (1985).

¶12 The alleged disparity here was neither a “facial injustice” nor “self-evident,” as Joseph claims. Rather, the putative \$230,000 difference between the value of the property he was awarded and that awarded Katherine depends, at minimum, upon the accuracy of his own assessments of the net value of that property and the value of a business he was awarded in the decree. Notably, Joseph submitted no documentation to substantiate his claims of indebtedness, and Katherine disputed his valuations in her response to the motion. Furthermore, the calculation by which Joseph produced the \$230,000 figure appears to be an oversimplification, focusing entirely on the real property awarded to Katherine and failing to take into account other assets and another business Joseph was awarded in the decree. In addition, we note that Joseph did not include in the record on appeal a transcript of the default hearing where the trial court accepted testimony from Katherine. We assume from the absence of this transcript that it

would support both the trial court's decree and its ruling on Joseph's motion. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶13 Generally, a defaulting party in a dissolution proceeding loses the opportunity to challenge the equity of a property award and the sufficiency of evidence supporting it. *See Villalba v. Villalba*, 131 Ariz. 556, 557-58, 642 P.2d 901, 902-03 (App. 1982). Here, we will not substitute our judgment for the trial court's when the facts pertaining to the motion were disputed and the trial court had a more immediate grasp of those facts. *See Birt*, 208 Ariz. 546, ¶ 9, 96 P.3d at 547. In sum, we find no abuse of discretion on the record before us.

Fees and Costs

¶14 Katherine has requested attorney fees and costs on appeal pursuant to A.R.S. § 25-324 and Rule 21, Ariz. R. Civ. App. P. Section 25-324(A) gives a court discretion to order one party to reimburse another for costs and expenses incurred in a marital dissolution action after taking into consideration both parties' financial resources and the reasonableness of their positions. We find Joseph acted unreasonably by (1) challenging the default judgment with a legally deficient motion and (2) failing to include documents in the record on appeal that would be necessary for this court to consider in order to grant relief. Because of these actions, Katherine has been forced to unnecessarily expend resources identifying and defending against legal claims that were not raised below or that otherwise had no reasonable likelihood of success on appeal. Thus, having considered the parties' respective financial resources, we grant Katherine's request.

Disposition

¶15 For the foregoing reasons, we affirm the trial court's ruling. We award Katherine her attorney fees and costs on appeal subject to her compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ *Peter J. Eckerstrom*

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ *Joseph W. Howard*

JOSEPH W. HOWARD, Chief Judge

/s/ *J. William Brammer, Jr.*

J. WILLIAM BRAMMER, JR., Judge